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Supreme Court, U.S.
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No. 04-285

IN THE

Supreme Court of the United States

MARC SEIBEL AND JEANETTE SEIBEL,
PETITIONERS

v.

JLG INDUSTRIES, INC., A PENNSYLVANIA CORPORATION AND BUILDERS SALES & SERVICE CO., AN ILLINOIS CORPORATION LICENSED TO DO BUSINESS IN THE STATE OF IOWA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR REHEARING

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GROUNDS FOR PETITION FOR REHEARING

The standard for admissibility for expert testimony in Federal cases is confusing and ambiguous. The difference in application of the *Daubert* standard and the Federal Rule of Evidence 702 was violative of due process and equal protection rights under the Fourteenth Amendment because it unlawfully denies equal access to the courts.

ARGUMENT

The Eighth Circuit Court of Appeals reviews the exclusion of expert testimony for abuse of discretion. *Jaurequi v. Carter Manufacturing Co., Inc., 173 F.3d 1076, 1081, (8th Cir. 1999).* The abuse of discretion standard applies as much to the trail court's decisions about how to determine the expert testimony's reliability as to its ultimate conclusion of admissibility. *Kumho Tire Co. Vs. Carmichael, 526 U.S. 137, 152, 119 S. Ct. 1167 (1999).*

The District Court did not follow the standard for admissibility set out in Rule 702 and, therefore, was unreasonable in concluding that Appellants' expert witness, Mr. Lobodzinski, was restricted in his testimony as to JLG and excluded from any testimony as to Builders.

The admissibility of expert testimony is governed by Rule 702 of the Federal Rules of Evidence, which states, If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or to determine a fact in

issue, **a witness qualified as an expert by knowledge, skill, experience, training or education** may testify thereto in the form of an opinion or otherwise....

Fed. R. Evid. 702 emphasis added. The recent amendments to Rule 702 expanded the Rule to include,

...If (1) the testimony is based upon sufficient fact or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Fed. R. Evid. 702, December 2001.

First, District Court unreasonably ignored the qualification of Mr. Lobodzinski as an expert. He has spent approximately 200 hours working on this case. Mr. Lobodzinski has acted as a consultant since 1973 or 30 years. He has been involved in many construction site accidents including approximately one dozen involving scissors lifts especially. Mr. Lobodzinski qualifies as an expert in this case.

Second, the testimony in this case is, in part, technical and the expert opinion of Mr. Lobodzinski would assist the trier of fact in understanding the evidence. Under Rule 702, this is clearly the purpose for which expert testimony is intended. Therefore, the District Court did not follow the standard for admissibility set out in Rule 702 in excluding the expert testimony of Mr. Lobodzinski.

The District Court abused its discretion while acting in its role as "gatekeeper" in this case. Although the Court is given wide discretion in its determination of the reliability and relevance of expert testimony, the Court must still act reasonably.

The District Court applied an improper standard regarding the testing performed by Mr. Lobodzinski. The standard set out in Rule 702 is to determine whether or not the theory or technique proffered by the expert witness can be or has been tested. In this case, the District Court changed the standard. The court ruled at the close of Plaintiffs' case that Mr. Lobodzinski theory of how the accident happened, was inconclusive. The District Court in effect changed the standard to "duplication" and the "ruling out other accident theories". Rule 702 should be the standard for all cases involving expert testimony.

Respectfully submitted,

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CERTIFICATION OF COUNSEL

Comes now, attorney Mark F. Cyr, counsel for Petitioners herein, and certifies that the foregoing Petition for Rehearing of the Order denying Petitioners' Petition for Writ of Certiorari complies with Rule 44 of this Honorable Court, and that same is limited to the requirements thereof. Counsel herein further certifies that this Petition is presented in good faith and not an attempt at delay.

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